Filed 4/2/10 P. v. Flores CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KARLO ANTONIO FLORES, Defendant and Appellant.	E045835 (Super.Ct.No. RIF128169) OPINION

APPEAL from the Superior Court of Riverside County. Thomas H. Cahraman, Judge. Affirmed.

Robert C. Kasenow, II for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Raquel M. Gonzalez and Lilia E. Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Following a jury trial, defendant Karlo Antonio Flores was convicted of forcible oral copulation (Pen. Code,[1] § 288a, subd. (c)(2), count 1); digital penetration by force (§ 289, subd. (a)(1), count 2); sodomy by force (§ 286, subd. (c)(2), count 3); inflicting corporal injury on a spouse with prior conviction for domestic violence (§§ 273.5, subd. (e), 273.5, subd. (a), count 4); and inflicting corporal injury on a child (§ 273d, subd. (a), count 5). He was sentenced to state prison for a term of 16 years, as follows: on count 1, the principal count, a middle term of six years; on counts 2 and 3, consecutive low terms of three years each; on count 4, a consecutive middle term of four years; and on count 5, a concurrent low term of two years.

Defendant appeals, contending: (1) the trial court erred in failing to give a unanimity instruction to the jury; (2) the trial court erred by not properly instructing the jury on the concept of reasonable discipline as to count 5; (3) there is insufficient evidence to support the conviction of sodomy by force in count 3; (4) the trial court should not have applied the mandatory consecutive sentence statute for counts 1, 2, and 3 absent an allegation and jury finding that the statute applied; and (5) the trial court erred in sentencing defendant in count 5. We find no error and affirm the judgment.

II. FACTS AND PROCEDURAL BACKGROUND

On the evening of December 8, 2005, defendant was preparing to leave his home to visit a friend and instructed his live-in girlfriend, N.B., not to call him on his cell

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

phone while he was away. However, N.B. later called defendant to ask him to bring home baby formula for their son. Defendant returned home around midnight, woke N.B., and asked her to prepare something for him to eat. While in the kitchen, defendant began asking N.B. why she had called him when he had instructed her not to, and he became aggressive. When she turned around, defendant grabbed her by the hair and threw her on the floor. He told N.B. to get in a kneeling position and to put her hands down her side, away from her face. Defendant hit her in the face three or four times. He then pushed her against the couch in the living room and kicked and punched her on her back and legs.

Defendant ordered N.B. to turn off all of the lights, take off her clothes, and crawl over to him and "suck [his] d---." She complied. Defendant then sat on the couch and repeated his demands. While N.B. orally copulated him, defendant slapped her in the face, pulled her hair, and called her a "bitch."

Defendant went into the garage and retrieved a white latex glove, which he put on his hand and inserted two of his fingers into N.B.'s anus. She pleaded for him to stop, telling him that he was causing her pain, but he continued this behavior for three to five minutes. Immediately thereafter, defendant put the glove on his penis and used it as a condom while trying to push his penis into her anus. N.B. testified that the glove was not lubricated, so "[i]t wasn't going to work." Defendant again ordered N.B. to resume oral copulation. After approximately 15 minutes, he ejaculated. The entire incident occurred over a period of five hours.

About 9:00 or 9:30 p.m. on December 9, 2005, N.B. went to the Moreno Valley station of the Riverside County Sheriff's Department and spoke with Deputy Aron Wolfe. She also informed the deputy about things she had seen defendant do to her seven-year old son, A. The interview was recorded, and the tape was played for the jury.

After the interview, N.B. was examined at a hospital by the Sexual Assault Response Team (SART) nurse, Mary Martin. Martin observed bruises on N.B.'s arms, back, abdomen and legs, and a laceration on her face. Martin conducted a rectal exam after N.B. complained of pain in that area, and Martin observed redness in the area between the anus and vaginal opening, prompting her to note "assault-related findings" in her report.

N.B. testified that she had seen bruises on A. on December 9, 2005. He had sustained the bruises the previous week while working on his math homework with defendant. N.B. heard three "smacks" and A. crying. She had seen defendant hit A. on prior occasions and testified that he would hit A. once or twice a month.

Deputy Wolfe spoke with A. on December 10, 2005, at the police station. Wolfe observed red marks and bruises on his arms and legs, and a red mark on his stomach. Wolfe testified that the marks indicated that A. had been hit with a belt.

On December 27, 2005, N.B. made a pretext call to defendant while in the presence of Sergeant Jon Wade at the Moreno Valley station. When accused of beating A. and N.B., defendant apologized and said he regretted what he had done. The tape was played for the jury.

At trial, N.B. testified that a prior act of domestic violence had occurred on August 25, 1999. Defendant had hit her with a shoe and with his hands. The court took judicial notice that defendant was convicted of a misdemeanor for domestic violence as a result of the August 25, 1999, incident.

Other facts are set forth in the discussion of the issues to which they pertain.

III. UNANIMITY INSTRUCTION

Defendant contends the trial court should have given sua sponte a unanimity instruction (CALCRIM No. 3500), because the evidence showed more than one unlawful act in support of the crimes of forcible oral copulation, digital penetration by force, corporal injury to a spouse, and corporal injury to a child. Defendant tries to characterize his incidents with N.B., and A. as multiple discrete events. Specifically, he argues: (1) N.B. testified that defendant directed her to orally copulate him on several different occasions on December 9; (2) N.B. reported that defendant penetrated her with his gloved finger, attempted to penetrate her anus with his gloved penis, and again penetrated her with his finger; (3) N.B. testified to numerous acts of violence perpetrated by defendant, including pulling her hair, slapping her face, choking her, throwing her to the ground, and punching her in the ribs; and (4) A. testified that between August 9, 2003, and December 9, 2005, defendant hit him with a shoe, a hanger, and a belt. Defendant asserts that the jury may not have agreed on the specific act supporting the verdict. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.)

"'It is fundamental that a criminal conviction requires a unanimous jury verdict [citations].'" (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.) "Where the jury

receives evidence of more than one factual basis for a conviction, the prosecution must select one act to prove the offense, or the court must instruct the jury that it must unanimously agree on one particular act as the offense. [Citations.]" (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.) However, no unanimity instruction is required when the offense constitutes a continuous course of conduct: "A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.] A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 423.) "The 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]" (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100, quoting *People v. Crandell* (1988) 46 Cal.3d 833, 875.)

Here, defendant's offenses were "based on a continuous course of conduct, whose acts were so closely connected in time as to form part of one transaction. [Citations.]" (*People v. Maury*, *supra*, 30 Cal.4th at p. 423.) Regarding oral copulation, N.B. described three acts, one when defendant first ordered her to turn off the lights, disrobe, crawl to him and perform oral copulation; the second occurred after he stopped the first, went over to the couch, sat down and ordered her to continue; and the third occurred after defendant had completed separate acts of anal penetration. Because these three acts were closely connected in time, occurred in the same room, and were part of defendant's ongoing sexual assault, we are not persuaded with defendant's claim that the "jury could

have disagreed as to what act constituted . . . count[1]." Defendant acknowledged the acts occurred between him and N.B. and argued that it was consensual. He did not offer three separate defenses. If the jury believed that N.B. consented to one act, it would have inexorably believed she had consented to all acts. Thus, we conclude no unanimity instruction was required.

Likewise, we conclude no unanimity instruction was required for count 2, which charged that defendant violated section 289, subdivision (a), because N.B. described two separate acts of anal penetration by defendant inserting his fingers in her anus. N.B. told the officers that defendant first attempted to penetrate her anus with his gloved fingers, then his gloved penis, and again with gloved fingers. Because these acts of digital penetration occurred close in time, separated by an act of sodomy, they were part of a continuous course of conduct that did not require a unanimity instruction. (*People v. Mota* (1981) 115 Cal.App.3d 227, 231-234 [repeated acts of rape during one hour].)

Regarding the injuries sustained by N.B., she testified that defendant pulled her hair, slapped her face, choked her, threw her on the ground, and punched her in the ribs. Defendant contends that "any one of [these acts] could have constituted the violation charged in count 4." Also, defendant claims the "sexual penetration, as charged in count 2, and/or the sodomy charged in count 3, could have supported the factual basis for the crime charged in count 4." We disagree. Again, the evidence shows defendant's acts of physical violence against N.B. were part of a continuous course of conduct that occurred within the same time frame and in the same location as the sexually assaultive conduct. Thus, there was no requirement to give a unanimity instruction. (*People v. Robbins*

(1989) 209 Cal.App.3d 261, 266 [no unanimity instruction required for great bodily injury enhancement where defendant beat and sexually assaulted elderly victim over several hours].)

Finally, regarding count 5, corporal injury on a child, A. testified that defendant had hit him with a belt, hanger and shoe. Defendant contends that "any of these could have constituted a separate violation of section 273d as charged in the amended information." In response, the People claim a unanimity instruction was not required, because the information charged a continuous course of conduct. Specifically, the People note the information charged that "'on or about August 9, 2003, through and including December 9, 2005, . . . [defendant] did willfully and unlawfully inflict cruel and inhuman corporal punishment and injury resulting in a traumatic condition upon a child.'" Because the offense charged consists of a continuous course of conduct, the People argue that no unanimity instruction was required. (*People v. Thompson, supra,* 36 Cal.App.4th at p. 851.) We agree.

"[If] the information alleged a course of conduct in statutory terms which had occurred between two designated dates[,] . . . [t]he issue before the jury was whether the accused was guilty of the course of conduct, not whether he had committed a particular act on a particular day." (*People v. Ewing* (1977) 72 Cal.App.3d 714, 717.) In *Ewing*, the defendant was charged with inflicting injury on a child between "July 1, 1975, and November 10, 1975. (*Id*. at p. 717.) According to the evidence, the child had suffered "scratches, scalds, burns and bruises" during this period. (*Id.* at p. 716.) Furthermore, on November 10, 1975, the doctors treating the child discovered he had suffered "three

separate subdural hematomas, one of which proved fatal." (*Ibid*.) Given these circumstances, the *Ewing* court held: "Here, the information alleged a course of conduct in statutory terms which had occurred between two designated dates. The issue before the jury was whether the accused was guilty of the course of conduct, not whether he had committed a particular act on a particular day. The instruction requiring jury unanimity as to particular acts was inappropriate. Its omission was not error." (*Id*. at p. 717.)

Here, the same is true. There was no need for a unanimity instruction as to defendant's individual acts against A. within the course of conduct. The jury only needed to agree on whether defendant committed the acts, the net effect of which constitutes the statutory offense. (*People v. Vargas* (1988) 204 Cal.App.3d 1455, 1462-1464 [continuous course of conduct doctrine applied to child abuse occurring over 10-day period].)

Finally, we agree with the People that any error was harmless. The failure to provide a unanimity instruction is subject to the *Chapman*[2] harmless error analysis on appeal. (*People v. Wolfe* (2003) 114 Cal.App.4th 177, 186 [Fourth Dist., Div. Two].) "Where the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless. [Citation.] Where the record indicates the jury

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[2] *Chapman v. California* (1967) 386 U.S. 18, 24.

resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless. [Citation.]" (*People v. Thompson*, *supra*, 36 Cal.App.4th at p. 853.)

Defendant's sole defense was consent. In finding defendant guilty of the crimes charged, the jury must necessarily have rejected this defense. Beyond testimony, the jury was presented with photographs. A picture is worth a thousand words. The photographs of the injuries and bruises to both N.B. and A. spoke volumes. Moreover, during the pretext phone call, defendant repeatedly apologized for his actions. From defendant's apologies, the jury could reasonably have inferred a consciousness of guilt. Thus, we conclude the error in failing to instruct the jury on unanimity was harmless beyond a reasonable doubt.

IV. FAILURE TO INSTRUCT WITH CALCRIM NO. 3405

Defendant contends the trial court erred in its sua sponte duty to instruct the jury on reasonable discipline (CALCRIM No. 3405[3]) as a defense to the crime of infliction of corporal injury on a child (§ 273d, subd. (a); count 5). He claims the photographs failed to show A.'s bruises that resulted from defendant's actions while helping A. with his homework. Defendant notes defense counsel relied upon the "discipline" theory in

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[3] CALCRIM No. 3405 states, in pertinent part, that "[a] parent . . . is not guilty of [any of the crimes charged] . . . if [he] used justifiable physical force [or another justifiable method] to discipline a child . . . [Physical force or other method of punishment] is justifiable if a reasonable person would find that punishment was necessary under the circumstances and that the [physical force or method] used was reasonable."

closing argument, and the prosecutor argued defendant was not reasonably disciplining a child. Thus, given the record and argument, defendant submits the jury should have been given CALCRIM No. 3405. The People respond that an instruction on the concept of reasonable discipline was not required or, in the alternative, that any error in failing to give the instruction was harmless. We agree with the People.

Defendant was charged with violating section 273d, subdivision (a) (count 5). The jury was instructed with CALCRIM No. 822, that to find defendant guilty of this offense, the prosecution had to prove beyond a reasonable doubt the following: (1) The defendant willfully inflicted an injury on a child; (2) The injury inflicted caused traumatic physical condition to the child; and (3) When the defendant acted, he was not reasonably disciplining a child. The jury was also instructed on the definition of traumatic injury.

"'"'"It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case.' [Citation.]"' [Citation.] The court has a sua sponte duty to instruct on defenses when '"it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."' [Citation.] Yet this duty is limited: 'the trial court cannot be required to anticipate every possible theory that may fit the facts of the case before it and instruct the jury accordingly. [Citation.] Thus, the court is required to instruct sua sponte only on general principles

which are necessary for the jury's understanding of the case. It need not instruct on specific points or special theories which might be applicable to a particular case, absent a request for such an instruction.' [Citations.]" (*People v. Garvin* (2003) 110 Cal.App.4th 484, 488-489.)

"A parent has a right to reasonably discipline by punishing a child and may administer reasonable punishment without being liable for a battery. [Citations.] This includes the right to inflict reasonable corporal punishment. [Citation.] [¶] However, a parent who willfully inflicts *unjustifiable* punishment is not immune from either civil liability or criminal prosecution. [Citations.] As explained in [*People v. Curtiss* (1931) 116 Cal.App.Supp. 771, 780], corporal punishment is unjustifiable when it is not warranted by the circumstances, i.e., not necessary, or when such punishment, although warranted, was excessive. [Citation.] '[B]oth the reasonableness of, and the necessity for, the punishment is to be determined by a jury, under the circumstances of each case.' [Citation.]" (*People v. Whitehurst* (1992) 9 Cal.App.4th 1045, 1050 (*Whitehurst*) [Fourth Dist., Div. Two].)

Turning to the case before this court, there is nothing in the record that supports an instruction on reasonable discipline. Unlike the defendant in *Whitehurst*, here defendant failed to offer any evidence to support his claim that the corporal punishment inflicted on A. was reasonable and necessary.[4] As the People point out, while N.B. acknowledged

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[4] According to N.B., defendant was helping A. with his homework when she heard defendant screaming that A. should learn the answers right away. N.B. then heard three "smacks" and A. crying. When she went to check on A., he had a bloody nose.

[footnote continued on next page]

that defendant was the primary parent in charge of disciplining A., she was not asked what type of discipline defendant used. Instead, her testimony demonstrated her belief that the corporal punishment of A. was excessive. During the pretext telephone call, defendant acknowledged he had severely beaten A. when he apologized, saying, "I'm so sorry, [N.]. I'm so fucking sorry." When she said, "You hit [A.] a lot," and he was "really scared of you," defendant responded, "I . . . understand this, okay?" At no time did defendant attempt to justify hitting A. as being reasonable parental discipline.

The defense of reasonable discipline is not available if the evidence shows the defendant was not acting within the scope of his parental authority or was acting for an unlawful purpose. (*People v. Checketts* (1999) 71 Cal.App.4th 1190, 1195 [Fourth Dist., Div. Two].) While *Checketts* concerned the kidnapping and false imprisonment of a child, it establishes that a parent's conduct becomes unlawful when it exceeds the scope of the rights afforded parents in their position as authority figures. Here, the evidence shows that defendant beat A. "badly" and "hit him a lot." The evidence further indicates that prior to the sexual assault of N.B., A. was hit repeatedly with a hanger and a belt across the arms and legs; he suffered a bloody nose as a result of the incident; and the bruises resulting from this abuse were visible at least one week later. This infliction of corporal punishment was both unreasonable and excessive. Accordingly, the failure to instruct the jury with CALCRIM No. 3405 was not in error. Even if we were to assume

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[footnote continued from previous page]
Later on, N.B. saw marks all over A.'s body. Such corporal punishment on a seven-year-old child who does not understand his homework is neither reasonable nor necessary.

that it was error, it was harmless, because no reasonable jury could conclude the "discipline" of A. was reasonable and necessary.

V. SUFFICIENCY OF EVIDENCE OF SODOMY BY FORCE

Defendant contends there is insufficient evidence to support his conviction of sodomy by force (§ 286; count three). He argues the evidence fails to prove that he "penetrated" N.B.'s anus with his penis. We disagree.

In determining whether there is sufficient evidence to support a conviction, this court reviews "the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) Furthermore, we "'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence,'" and "'resolve the issue in the light of the *whole record* . . . .'" (*Id.* at p. 576.)

"Section 286, subdivision (a) defines sodomy as the 'contact between the penis of one person and the anus of another person. Any sexual penetration, however slight, is sufficient to complete the crime of sodomy.'" (*People v. Farnam* (2002) 28 Cal.4th 107, 143, fn. omitted.) Penetration is an essential element of the crime of forcible sodomy. (*People v. Martinez* (1986) 188 Cal.App.3d 19, 23-25.) "Lack of trauma to a victim's rectum does not preclude a finding that the victim was sodomized. [Citation.]" (*People v. Farnam*, *supra*, at p. 144.)

Here, substantial evidence supports the jury's inherent finding that defendant had penetrated N.B.'s anus, however slightly. N.B. testified she felt defendant push his penis into her anus and that it went in as far as his fingers had gone in when he digitally penetrated her. She felt pain and conveyed her pain to defendant when he tried to penetrate her anus with his penis. She later reported the sodomy and complained of pain and discomfort in her anus to the examining nurse who conducted the SART examination. The examining nurse noticed that the area between the anal opening and the vaginal opening was reddened, which was not a normal finding. The fact that N.B. testified "it wouldn't work, because it wasn't lubricated" should not be used to suggest that defendant did not penetrate her anus within the meaning of section 286. Instead, her testimony shows that defendant forcibly made contact between his penis and her anus and that the act was made difficult by the lack of lubrication offered by the latex glove. Thus, both N.B.'s testimony and former statements constituted substantial evidence that defendant had penetrated her anus. (*People v. Ribera* (2005) 133 Cal.App.4th 81, 85-86 [poking victim's covered anus with penis constitutes penetration]; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 790 [rectal pain plus victim's testimony defendant "tried to enter a little bit, but it hurt a lot," sufficient to support at least slight penetration], disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330.)

VI. MANDATORY CONSECUTIVE SENTENCING

The trial court imposed full consecutive terms for defendant's convictions of digital penetration by force and sodomy by force in counts 2 and 3 pursuant to section 667.6, subdivision (d). Defendant contends the imposition of full consecutive sentences violated his right to a jury trial under *Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*)[5] because the sentence was not supported by the jury's verdict. He further claims imposition of the full consecutive sentence under section 667, subdivision (d) is invalid, because it was not "plead [*sic*] nor proved." The People reply that the imposition of consecutive sentences was proper and defendant's contentions are without merit.

In its analysis of the applicable sentencing provisions, the trial court relied upon section 667.6, subdivision (d), which states: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." To determine whether conduct has occurred on separate occasions, "the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." (§ 667.6, subd. (d).) Here, the trial court determined "the answer has to be yes because these assaults happened over several hours." To further

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[5] In *Cunningham, supra*, 549 U.S. 270, 274, the Court held that California's determinate sentencing law, which authorized the judge, not the jury, to find facts exposing the defendant to an elevated upper term sentence violated the defendant's right to trial by jury.

support this assertion, the trial court noted that "in between the forced oral copulation and one of the other events, he [defendant] had her stand naked while he watched TV."

Acknowledging the trial court made the required finding that there was adequate time for reflection, defendant nevertheless argues such finding must be made by the jury and not the judge. We disagree. In *People v. Black* (2007) 41 Cal.4th 799, the California Supreme Court explained that while *Cunningham* had addressed the necessity of jury findings to support the selection of upper terms, it did not apply to the discretionary decision of whether sentences for two or more crimes should be served consecutively. (*Black, supra*, at pp. 821-823.) While *Black* addressed the imposition of consecutive terms under section 669, the analysis is applicable to the imposition of consecutive terms under section 667.6, subdivision (d), in the present case. (*People v. Martinez* (2008) 166 Cal.App.4th 1598, 1605.)

As defendant recognizes, the trial court could have imposed consecutive sentences under the discretionary provision of section 667.6, subdivision (c). That being established, the People aptly note the judicial fact finding utilized for sentencing under section 667.6, subdivision (d), did not increase sentencing beyond the statutory maximum because the court could have reached the same sentence under section 667.6, subdivision (c). (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1231.) Therefore, the failure to submit the question of whether the acts occurred on separate occasions to the jury did not violate the Sixth Amendment.

Defendant's claim that the sentencing provisions of section 667.6, subdivision (d), are inapplicable in this case because the information failed to plead them and the

prosecution failed to prove them, lacks support. He has not cited any statutory or case authority on point that establishes such pleading and proving requirement. Given the facts in this case, coupled with the applicable statutes, we find defendant's analogy to *People v. Lo Cicero* (1969) 71 Cal.2d 1186, 1192-1193, and *In re Varnell* (2003) 30 Cal.4th 1132, 1140, inapplicable.

Notwithstanding the above, defendant further contends he should have been able to argue for sentencing under section 1170.1, subdivision (a) and, therefore, the trial court's imposition of mandatory consecutive sentencing under 667.6, subdivision (d) was equivalent to an increase in punishment. However, section 1170.1 is the governing statute for sentencing for the sex crimes specified in section 667.6, subdivision (d) *only if* the trial court elects not to sentence for those crimes under section 667.6, which more specifically describes sentencing provisions for the sex crimes committed in the present case. (*People v. Waite* (1983) 146 Cal.App.3d 585, 594, disapproved on other grounds as stated in *People v. Jones* (1988) 46 Cal.3d 585, 592, fn.4.) "If the trial court elected to proceed under section 667.6, subdivision (c), it was required to state the reason for its discretionary sentencing choice [citation], but this did not create a presumption of or legal entitlement to sentencing under section 1170.1. [Citations.]" (*People v. Diaz* (2007) 150 Cal.App.4th 254, 268; see also *People v. Reeder* (1984) 152 Cal.App.3d 900, 922,923.)

VII. CONCURRENT SENTENCE

Defendant contends the trial court erred in sentencing him as to count 5, corporal injury of a minor, and that the sentence should be reduced from a concurrent two years to a consecutive eight months (one-third the middle term). The People respond that

defendant's contention fails, because the one-third the middle term rule applies only when the court imposes a consecutive sentence under sections 669 and 1170.1. We agree with the People.

In discussing sentencing with trial counsel, the trial court noted that it would impose a concurrent sentence for the child abuse conviction, "not because it's unimportant, but because there's a point at which 16 years adequately responds to the behavior here." Noting the one-third the middle term rule, the trial court stated, "It's like a box, one box with the sex offenses, then you have to start over with the others." The trial court concluded that the rule was inapplicable in this second "box" and imposed a sentence of two years, to run concurrently.

In his contention of sentencing error as to count 5, defendant references section 1170.1, which reads, in pertinent part: "[W]hen any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed . . . the aggregate term of imprisonment for all of these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed . . . . The subordinate term for each consecutive offense shall consist of one third of the middle term of imprisonment . . . ." (§ 1170.1, subd. (a).) By its own terms, section 1170.1 only references *consecutive* sentences for multiple felonies and is therefore clearly inapplicable to the concurrent sentence imposed for count 5. Since the one-third of the middle term rule does not apply to the sentence imposed, and the judge was within his discretion to impose the middle term, the sentence remains two years in prison, to run concurrently.

VIII. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST
Acting P. J.

We concur:

KING
J.

MILLER
J.